

SOUTH AFRICA / JUDGMENT

## Magricor (Pty) Ltd v Border Seed Distributors CC; In re: Border Seed Distributors CC v Magricor (Pty) Ltd (1072/2020) [2020] ZAECGHC 103 (8 September 2020)

[2020] ZAECGHC 103

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Kroon AJ

CASE / FILE NUMBER

1072/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

No.: 1072/2020

Date

Heard: 25 August 2020

Date

Delivered: 8 September 2020

In

re: MAGRICOR  
(PTY) LTD  
Applicant  
and  
BORDER  
SEED DISTRIBUTORS CC  
Respondent  
BORDER  
SEED DISTRIBUTORS CC  
Plaintiff  
MAGRICOR  
(PTY) LTD  
Defendant

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**JUDGMENT**

KROON AJ:

**OVERVIEW**

1. This is an urgent application brought by the Applicant ("Magricor") in two parts, namely part A which is in substance an application to stay the execution of a judgment and part B which is an application to rescind the said judgment in terms of rule 42(1)(a) of the Uniform Rules of Court on the basis that it did not receive proper service of the summons. Only Part A is before me for adjudication. It is opposed by the Respondent ("Border Seed").

2. A combined summons was issued on 5 June 2020 by Border Seed and, pursuant to an application for default judgment, an order was granted on 2 July 2020, by Beshe J in the following terms:

"

1. Payment in the sum of R679 434.11 (SIX HUNDRED AND SEVENTY NINE THOUSAND, FOUR HUNDRED AND THIRTY FOUR RAND, AND ELEVEN CENTS);
2. Payment of interest on the sum of R679 434.11 (SIX HUNDRED AND SEVENTY NINE THOUSAND, FOUR HUNDRED AND THIRTY FOUR RAND, AND ELEVEN CENTS) at the legal rate prevailing from time to time,

computed a tempore morae to date of payment thereof;

3. Costs of suit."

3.

In the Summons it was alleged that, between 14 March 2019 and 20 May 2019, Magricor had made nine purchases from Border Seed and had settled the invoices generated pursuant to these purchases save for the VAT portion in respect of each invoice which unpaid portions totalled an amount of R679 434.11.

4.

The rescission application which, as mentioned above, is based on an allegation of defective or non-service, does not contain any indication as to what the defence to the claim would be, were rescission to be granted.

5.

Ms Stretch, who appeared on behalf of Border Seed, strenuously argued that the application in respect of interim relief, namely to stay the enforcement of the judgment, should be evaluated in the shadow of this omission. She submitted that the failure to disclose a defence, in and of itself, demonstrated that the application was simply a tactic by Magricor to delay the execution of the judgment and it was therefore not a bona fide application but rather an abuse of the court's process.

6. Mr Sishuba, who appeared on behalf of Magricor, submitted that no such inference could be drawn because, given the basis for the rescission application, namely that the judgment had been erroneously granted, it was not necessary for Magricor to disclose in the rescission application its defence to the claim, good cause not being a requirement for the granting of such an application. In this regard he referred to *Topol & Others v LS Group Management Services (Pty) Ltd*[1]
7. In the light of the conclusion to which I come, it is neither necessary nor desirable to express a view on these submissions.

#### CERTIFICATE OF URGENCY

8. At the outset of the hearing I raised with Mr Sishuba the absence of a certificate of urgency. In response it was his submission that, because the matter was on a normal motion court day, a certificate of urgency was unnecessary. In this context he referred to paragraph 12 of the Joint Rules of Practice for the High Courts of the Eastern Cape Province ("the Joint Practice Rules").

9.

Ms Stretch contended that a certificate of urgency was required.

10. The Joint Practice Rules provide as follows:

"

#### 12. URGENT APPLICATION

- (a) In all applications brought other than in the ordinary course in terms of the rules of Court, the legal practitioner who appears

for the Applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the Judge and in which the reasons for urgency are fully set out.

- (b) The certificate of urgency shall set out the grounds for urgency with sufficient particularity for the question of urgency to be determined solely therefrom without perusing the application papers."

11. As appears from paragraph 12(a) it is clear that a certificate of urgency is necessary in all applications where an applicant does not follow the ordinary course (does not comply with the time periods set out in the rules).

12. Thus the circumstance that an urgent application is set down on a normal motion court day does not absolve an applicant of the obligation to produce a certificate of urgency.
13. Self-evidently, if it had been the intention behind the rules that a certificate of urgency was not necessary when the application was enrolled on a day normally reserved for the hearing of motion court matters, this much would have been stated. In this context, the wording utilised is to be contrasted with the wording in the introduction to paragraph 12(d), a paragraph dealing with the issuing of directives, and where reference is made to "a day normally reserved for the hearing of motion court matters".
14. Coincidentally, in a judgment given on the same day that this matter was heard, Lowe J held that a certificate of urgency is necessary on a normal Motion Court day[2] This decision is, to my knowledge, consistent with the approach which has been adopted in this division.[3]
15. The failure to produce a certificate of urgency was, in my view, in and of itself a basis for refusing to entertain the application, particularly in circumstances where the Court was not asked, nor was a basis laid, to condone this failure.
16. In my view the following sentiments expressed by Goosen AJ (as he then was) find application in this matter:

"40) The purpose of a certificate of urgency is to enable the Court called upon to deal with the matter to gather, from a perusal of the certificate alone, why the matter is to be regarded as urgent. The certificate should also enable the judge to decide - at least upon a prima facie basis - that the matter is in fact urgent enough to warrant immediate attention. Once that decision is taken, the judge can be assured that the matter ought to enjoy preference on the roll and can then proceed to read the papers in preparation for the matter being called. The certificate is calculated to ensure efficiency in the administration of justice and to avoid an unnecessary waste of time in dealing with matters which ought not to be dealt with other than in the ordinary course.

- 41) A failure to file a certificate which not only accords with the provisions of the Rules of Practice and which manifestly does not meet its purpose may well result in the matter being struck

from the roll. It may also, in an appropriate matter, result in an appropriate costs order being made, not against the litigant but against the practitioner responsible for the failure to comply with the rules of practice." [4]

17. I am in any event of the view that the matter should not be entertained for reasons relating to urgency.

URGENCY

18. In its notice of motion Magricor seeks, as preliminary relief, leave of this Court for the matter to proceed as an urgent application as envisaged by the provisions of Rule 6(12) of the Uniform Rules of Court.
19. The question of urgency is dealt with in a single paragraph and under this heading Magricor does no more than record that a writ was issued on 17 July 2020. The founding affidavit is otherwise silent on the events leading up to the bringing of the application.
20. The first material omission is that Magricor does not disclose as to when it became aware of the Judgment. Indeed, no details are provided to explain the delay which occurred between the granting of the default judgment, namely on 2 July 2020 until the application was brought on 21 August 2020 and in terms of which the matter was then set down on a date four days later, namely on 25 August 2020.
21. In a communication attached to the answering affidavit of Border Seed, a representative of Magricor appears to record that the Sheriff arrived at the premises of Magricor on 4 August 2020 "with a writ of execution". Magricor sought to make reference to this communication in making submissions in respect of urgency. I have reservations as to whether it is permissible for Magricor to place reliance on the contents of an annexure to the answering affidavit to build its case in respect of urgency (allegations relevant to urgency being required to be contained in the founding affidavit), but I am prepared to assume, for the purposes of adjudicating this application, that Magricor became aware of the Judgment on 4 August 2020.
22. I turn now to the attenuated notice of the hearing, namely that of four days. 23. In response to enquiries made by the Court as to why the matter was set down on such short notice, Mr Sishuba made a statement from the Bar that the sale in execution was "imminent".
24. When he was asked to elaborate on this statement he was unable to provide the Court with a date as to when the sale was going to take place and, as mentioned above, there were no allegations in the founding affidavit to support the statement that a sale was "imminent" or that any sale had been scheduled.
25. If a sale had indeed been arranged by the Sheriff then it would have been expected of Magricor, in addition to making allegations to support this fact, as a minimum, to have attached the advertisement of such sale to the founding affidavit. That way, the Court would have been apprised, not only of the date of the sale but also the property which was to be the subject matter of the sale, so as to establish the potential harm to Magricor were relief not granted to it as prayed for. This was not done.
26. Viewed objectively, there is no indication from the papers that, on 4 August 2020, the Sheriff did any more than demand payment in terms of the writ as envisaged by Rule 45(3). I would add there is no suggestion in the founding affidavit that any property was seized or even inventoried by the Sheriff.

27. Turning to the procedure adopted by Magricor in placing the matter before the Court on an urgent basis, what stands out is that, in respect of the prayer for interim relief (Part A), no provision was made in the notice of motion for the filing of a notice of opposition, answering affidavit and replying affidavit when, in my view it should have been obvious, or at least foreseeable, to Magricor that such an application would attract opposition.
28. The requirements attendant upon the bringing of urgent applications are not controversial.
29. An applicant is required to consider the degree of urgency accompanying its case and thereafter to design a time table for the filing of papers which is commensurate with the degree of urgency established:

"Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. ... [A]n applicant must make out a case in the founding affidavits to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down." [5]

30. Thus urgency per se does not relieve a party from carefully modifying the applicable time periods giving due consideration to the degree of urgency in the matter and an applicant should, in as much detail as possible, place such facts that are necessary before the court and which will enable the court to decide whether the forms and service provided for in the rules should be dispensed with. Only once an applicant has persuaded the court that sufficient grounds exist which necessitate a relaxation of the rules to the extent which has been done by an applicant, will the court proceed to consider the matter as one of urgency.
31. Without wishing to belabour the point, a feature of this urgent application is that Magricor did not take the trouble to devise a timetable for the filing of answering papers.
- 32.

In *Caledon Street Restaurants CC v Monica D' Aviera* [6], with which I respectfully align myself, it was emphasized by Kroon J that the mere existence of some urgency will not justify the wholesale disregard of the time limits contained in the rules.

33. On an elementary analysis of the facts one is driven to the conclusion that the approach proscribed in *Caledon Street* is precisely the approach taken by Magricor in that it operated off the premise that the mere existence of some urgency could be utilised as a licence to conduct its litigation by way of the wholesale disregard for the rules.
34. In summary then, firstly there was no certificate of urgency, which, in the circumstances, would constitute a self-standing basis for refusing to entertain the application. Secondly, there was no provision in the notice of motion for opposition to the application for interim relief and no timetable was provided therein so as to ensure the proper ventilation of the application. Thirdly, no factual basis was laid in the founding affidavit as to why, after being

confronted by the Sheriff on 4 August 2020, it took two and a half weeks to bring the application. Fourthly, there was no explanation as to why, when the application was eventually brought, it was required of the court to entertain it four days later when, on the affidavits, execution of the judgment was still in its embryonic stages. The application, viewed from all these angles, was flawed for reasons relating to urgency.

35. The hearing of this matter on a full Motion Court roll was a material inconvenience to the Court, to Border Seed which was unable to prepare

Heads of Argument as was done on behalf of Magricor and to the other litigants who had waited their turn and properly set their matters down in compliance with the rules of the Court. The application did not deserve the preference it sought.

36. For the reasons set out above, I am not inclined to entertain the application.
37. This Judgment is obviously not to be interpreted as holding that applications of this nature, namely where the stay of the enforcement of a judgment is sought pending the outcome of the rescission application, should not be granted. Such applications are routinely granted as generally it is only sensible that a rescission application, which has been timeously brought and enjoys prospects of success, should be determined before execution of the impugned judgment is allowed. What is not permitted however, as was done in this case, is to require of the Court to make a decision, as it were, in the dark and without proper procedures having been followed.
38. I would add only that it is readily acknowledged that there will be circumstances, depending on the facts of each case, where, notwithstanding material non-compliance with the rules of Court, a matter should nonetheless, in the interests of expediency, be entertained.
39. As was pointed out by Brooks AJ[7] (and he then was), commenting on Caledon Street, the Court is required to exercise a discretion and to strike a balance between, inter alia, the requirement that the Court ensures that its rules are respected and the undesirability of a duplication of hearings and the additional time, effort and costs which would inevitably accompany a second hearing.
40. Having due regard to the particular facts of this matter, in my view this is not a case where Magricor should be indulged. I say so for two primary reasons.
41. Firstly, the non-compliance with the requirements attendant upon the bringing of an urgent application is so gross that to overlook it would send the wrong signal to practitioners.
42. Secondly, the papers in this matter are not voluminous and the issue is a crisp one and accordingly any duplication which may potentially occur were another Judge required to revisit the application for interim relief would not be unduly burdensome on the Court and the litigants.

43. In conclusion, and as was found in Caledon Street, this is a matter where the attractiveness of finally disposing of the litigation should not be allowed to govern and a line should be drawn in respect of Magricor's unacceptable invoking of the urgency procedures provided for in the rules. [8]

#### THE ORDER

44. The following order is accordingly issue:

44.1. The application is struck from the roll with costs.

PN KROON

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Sishuba

instructed by Hexana Attorneys

For Respondent: Adv Stretch

instructed by Wheeldon Rushmere & Cole

[1] 1988 (1) SA 639 (W)

[2] Mncedisi Dyke and Others v The MEC for Rural Development and Agrarian Reform, Eastern Cape Province (case no. 351/2020)(Eastern

Cape Local Division, Bhisho)

[3] Zolile Godfrey Madlongolwana & Another v Walter Sisulu University & Others : Case No. 484/2016 (Eastern Cape Local

Division : Mthatha) as delivered on 10 March 2016 at paragraph [4]

[4] January v Standard Bank of South Africa Ltd (2235/2008) [2010] ZAECGHC 6 (28 January 2010)

[5] Luna Meubelvervaardigers (Edms) v Makin and Another (t/a Makin's Furniture Manufacturers)

1977(4) SA 135(W) at pp 137E-G

[6] Unreported judgment of Kroon J, ECO Case No. 2656/97

[7] Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others (1820/2013) [2013] ZAECMHC 14 (7 August 2013) at Page 7

[8] At pages 11 and 21

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